

# THE BOND BUYER

## North Dakota and Minnesota try to break logjam on flood project

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DALLAS – The U.S. Army Corps of Engineers, North Dakota, and Minnesota are renegotiating terms of a public private partnership billed as the solution to flooding in the metro areas of Fargo, N.D., and Moorhead, Minn. in an effort to end an impasse between the two states that could drive up project costs.

The \$2 billion Fargo-Moorhead Area Diversion Project, which would be partly bond financed, was put on hold after a federal judge issued an injunction on Sept. 7 temporarily blocking construction until the Army Corps obtains the necessary permits from the Minnesota Department of Natural Resources.

The DNR denied a permit to build a dam across the Red River in October, arguing that emergency measures like those used during a devastating 2009 flood and new dikes should be enough. The Corps however, acting on congressional authorization, began construction on the diversion inlet structure near Horace, N.D. in April 2017.

North Dakota Gov. Doug Burgum and Minnesota Gov. Mark Dayton on Oct. 6 formed a 16-member task force to try to address the Minnesota DNR's concerns about the flood protection project within the next 60 days. The working group consists of eight members from North Dakota and eight members from Minnesota, plus the two governors as co-chairs.

"It's essential that we overcome our differences and reach consensus on this project in a timely fashion to avoid having to return to the drawing board and burden taxpayers with years of costly delays while leaving the public vulnerable to catastrophic flooding," Burgum said.

"Failure's not an option," Dayton said. "There's got to be flood protection for this growing region, and the people around it."

The governors agreed that the task force must come up with a solution that will be able to obtain a permit from Minnesota's DNR and that will satisfy upstream opponents of the project.

Some are worried that the delays will drive up project costs. "Anytime you have a delay it increases costs – time is money," said Corps project manager Aaron Snyder. "It is important for us to move forward on this sooner rather than later."

The project marks the Corps' first use of a public-private partnership, which backers say will save \$400 million and reduce the project delivery timeline by more than 50% compared with traditional approaches. Approximately \$900 million would be financed through the issuance of sales tax revenue bond issued by the Fargo-Moorhead Diversion Authority -- an entity that was created by an inter-governmental agreement among five member entities: the city of Moorhead, Clay County, Minn., Cass County, N.D., Fargo, and the Cass County Joint Water Resources District.

The federal court ruling means the two states must come to an accord on how to proceed with the project. U.S. District Judge John Tunheim in his September ruling said the Minnesota permit was absolutely necessary for the project to proceed and also urged all parties to work towards an agreement that would serve the interests of both states and the affected communities.

Congressional authorization for the new project allows for modifications, said Snyder. "To remain within that federal authorization, there has to be a diversion channel in North Dakota, a southern embankment and minimal downstream impacts," said Snyder. "We have some flexibility there to modify alignments, modify operations and to continue to find ways to minimize impact to people in the environment."

Last week, the Corps held a closed-door meeting with members of the Diversion Authority and elected officials to talk about the stalled project.

Maj. Gen. Richard Kaiser, commander of the Corps' Mississippi Valley Division, which includes eastern and northern North Dakota, said at a press conference after the meeting that the Corps can modify the project to meet Minnesota regulators' demands. Part of the compromise could mean reducing the volume of water stored behind a dam upstream of the diversion channel and storing it elsewhere.

Sen. John Hoeven, R-N.D., said one of the key things discussed at the meeting was that there aren't any immediate technical hurdles to the project. The real

question, he said, is whether “policymakers can agree on what the project ought to be like.”

The project is billed by supporters as a permanent solution to flooding in the metropolitan areas of Fargo and Moorhead that would protect more than 225,000 residents and \$14 billion of property by directing Red River floodwaters away from Fargo and other areas that suffered from a massive flood in 2009.

Protecting Fargo and Moorhead from flooding comes at the cost of inundating land south of the metro area during severe floods of which 60% would be in Minnesota. The state would receive only 14% of its benefits, critics say, whereas North Dakota would receive 86% of the benefits, while hosting only 40% of the newly flooded land.

The project received authorization from Congress in 2014 and Congress provided funding to construct the project in 2016. But in October 2016, Minnesota’s DNR denied a permit to build a dam across the Red River, arguing that emergency measures like those used during the 2009 flood and new dikes should be enough.

Construction began despite the outstanding legal questions.

Snyder said that it is too early to speculate what may happen with the project’s timeline. “We are hopeful that we can find some sort of mutual agreement so we can move forward and build this project as quickly as possible, ” said Snyder.

John Shockley, an attorney with the firm Ohnstad Twichell, the bond counsel and project lead for the flood diversion project, said the litigation does directly impact the bond financing. Cass County citizens approved collection of a 0.5% sales tax to back the debt six years ago. They extended the tax until 2084 in a November 2016 referendum.

“The litigation has nothing to do with the sales tax or the special assessment tax that are used to finance the P3 project,” said Shockley. “What is impacted is the P3 procurement schedule. The schedule is temporarily delayed due to the injunction.”

The Diversion Authority had been set to receive final bid proposals from competing developers for the public-private partnership on December 15. The project was scheduled to select the developer in the first quarter of 2018.

The four consortiums eligible to bid are Lake Agassiz Partners, Red River Valley Partners, Red River Valley Alliance and Red River Partners, all made up of national and international firms.

Fargo Mayor Tim Mahoney, who chairs the Flood Diversion Board of Authority, said the cost of construction increases by \$60 million annually.

“We simply cannot live with that level of financial risk, or the risk to public safety of not having protection,” Mahoney said in a statement. “We will keep working hard toward establishing flood protection for the Fargo and Moorhead communities; hopefully we can do that in partnership with Minnesota.”

The project has three main parts: in-town levee projects; a southern embankment; and a bond-financed, 36-mile-long, 1,500-foot-wide diversion channel with 32,500 acres of upstream staging, including aqueducts, river inlets and bridges, and a dam. The southern embankment regulates water to prevent flooding of the metro area during a significant flood.

The federal government has committed to \$450 million in construction appropriations. The project has received \$20 million in federal funding through the Corps work plan for fiscal year 2017. The project previously received a federal “new start” status and \$5 million in federal appropriations for construction in the fiscal year 2016 Corps work plan. The fiscal year 2016 funding is being used for construction of the diversion inlet and control structure south of Horace.

Shockley said that the project had not yet reached the point where they had asked for a rating on the financing. “We had approached all three ratings agencies and provided them background information but a formal rating hadn’t been requested.”